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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**

7 CYNTHIA L. CZUCHAJ, an
8 individual, on Behalf of Herself and on
9 Behalf of All Persons Similarly
Situating,

10 Plaintiffs

11 vs.

12 CONAIR CORPORATION, a Delaware
corporation; and DOES 1 through 10,
13 inclusive,

14 Defendants.

CASE NO.: 13CV01901-BEN-RBB

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
CYNTHIA L. CZUCHAJ AS PLAINTIFF
PURSUANT TO *FEDERAL RULES OF
CIVIL PROCEDURE* RULE 12(b)(1); DEC.
OF KATHERINE J. ODENBREIT; DEC.
OF CYNTHIA CZUCHAJ; OBJECTIONS
TO EVIDENCE SUBMITTED IN
SUPPORT OF MOTION [filed
concurrently herewith]**

Hearing Date: April 7, 2014

Hearing Time: 10:30 a.m.

Courtroom: 5A

Complaint Filed: 8/15/2013

Trial Date: None

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO
FRCP 12(b)(1)**

I. SUMMARY OF ARGUMENT IN OPPOSITION

This is an omissions and product defect case alleging the defect created a serious risk of injury to Plaintiffs and putative class members. Plaintiffs also allege a breach of the Implied Warranty of Merchantability, Song-Beverly Act and Magnuson-Moss Warranty Act based on the allegations that the dangerously defective product was unfit for its intended purpose because the defect causes it to spark and/or catch fire during normal use. Plaintiffs are not alleging any claims related to Conair's express warranty of the product, therefore Plaintiff would not be required to submit a warranty claim prior to filing an action alleging the product was defective.

Defendant Conair ("Conair" or "Defendant") designs, manufactures, markets, advertises and sells the alleged defective Conair Infiniti Pro 1875 watt hair dryer ("Hair Dryer"). The Hair Dryers have a propensity to spark and catch fire during normal use putting hundreds of thousands of consumers at risk of serious injury. Conair never disclosed to consumers prior to the purchase of the Hair Dryers that they are defective.

The sole challenge set forth in Defendant's Motion to Dismiss is the standing of Plaintiff Cynthia Czuchaj, individually. Conair asserts Plaintiff Czuchaj has not alleged an "injury in fact". Specifically Defendant claims Plaintiff Czuchaj does not allege recovery for personal injury or property damages except the cost of the defective devices, and she never submitted a warranty claim to Conair which was rejected. In addition, Defendant also appears to be requesting the Court dismiss Ms. Czuchaj's claims for lack of "redressibility" because Conair alleges to have fixed the defect and therefore the Court cannot grant the injunctive or declaratory

relief requested.¹ Conair admittedly does not challenge the standing of the other three representative plaintiffs, only Plaintiff Czuchaj.

A. Plaintiff Cynthia Czuchaj

Plaintiff Cynthia Czuchaj purchased the Hair Dryer from a Sam's Club retail store in approximately October 2011. FAC, ¶5. While using the Hair Dryer for its intended purpose (i.e., drying her hair), it suddenly sparked and caught fire causing Ms. Czuchaj to drop it to the ground to avoid serious bodily injury. FAC, ¶5. Ms. Czuchaj managed to unplug the device from the wall. She then discovered that her carpet had been scorched and damaged by the hair dryer when it caught fire.² Ms. Czuchaj, on behalf of herself and putative class members, is seeking to recover not only costs incurred in purchasing the dangerous product, but also any damages caused by the manifestation of the defect, including damage to property. Plaintiff Czuchaj has provided adequate allegations that she is seeking these damages through the FAC to put Defendant on notice these damages are being sought. This is set forth sufficiently in Plaintiffs' causes of action:

- "Plaintiff and consumers lost money by paying for a dangerous product they would not otherwise have purchased, in addition to damage to their property and/or person caused by the Hair Dryer spontaneously catching fire." FAC, ¶67(a)-allegations in the First Cause of Action: violations of Cal.Bus.&Prof. Code §17200, *et seq.* (Asserted by Cynthia Czuchaj on Behalf of the Nationwide Class, or in the alternative, the California Class). FAC, p. 21.

¹Defendant's Motion to Dismiss ("MTD"), pp. 11-12.

²These specific facts were inadvertently omitted from the FAC, but Plaintiff Czuchaj intends to seek such damages. Dec. of Cynthia Czuchaj ("Czuchaj Dec."), ¶2. If the Court grants Defendant's Motion to Dismiss, Plaintiffs would request leave to amend to add these factual allegations which would cure the defect. On March 2, 2014, Plaintiffs' counsel informed Defendant's counsel these facts were inadvertently omitted from the FAC and that Plaintiff Czuchaj is seeking to recover damages for her scorched carpet. Dec. of Katherine J. Odenbreit ("Odenbreit Dec.") On March 4, 2014, Plaintiffs' counsel sent a proposed amended complaint to Defendant for consideration including these allegations. Defendant declined to stipulate to the filing of the proposed amended complaint. *Id.*

- 1 • “As a direct and proximate result of the unreasonably dangerous
2 condition of the Hair Dryers, Plaintiffs and others similarly situated
3 suffered property damage and economic loss to be determined at trial.”,
4 FAC, ¶91-allegations in the Third Cause of Action for Strict Products
5 Liability by all Plaintiffs including Plaintiff Czuchaj. FAC, p. 26.
- 6 • “As a direct and proximate result of Defendant’s failure to warn of the
7 risk of physical injury and injury to property that can be caused by the
8 Hair Dryer, Plaintiffs and Class Members suffered property damage and
9 economic loss in an amount to be determined at trial.” FAC, ¶97-
10 allegations in the Fourth Cause of Action for Strict Products Liability-
11 Failure to Warn brought by all Plaintiffs including Plaintiff Czuchaj.
12 FAC, p. 26.
- 13 • Plaintiffs’ **Prayer for Relief** includes: “c. An award of actual,
14 consequential, compensatory, restitution, punitive and other damages
15 permitted by law.” FAC, p. 39.

16 As set forth herein, Plaintiff Czuchaj does have standing to bring this action and
17 has a claim or controversy. Therefore, Defendant’s Motion should be denied in its
18 entirety.

19 II. STANDARDS

20 There are two types of challenges under FRCP Rule 12(b)(1): “facial” and
21 “factual”. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). A facial attack
22 challenges that the allegations contained in the complaint are insufficient on their
23 fact to invoke federal jurisdiction. A factual attack challenges the truth of the
24 allegations that would otherwise invoke federal jurisdiction. *Safe Air for Everyone*
25 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004). While the district court may
26 consider evidence beyond the complaint in a factual attack without converting the
27 motion to dismiss to a motion for summary judgment, the Ninth Circuit has
28 cautioned that a “[j]urisdictional finding of genuinely disputed facts is

1 inappropriate when ‘the jurisdictional issue and substantive issues are so
 2 intertwined that the question of jurisdiction is dependent on the resolution of
 3 factual issues going to the merits’ of an action.” *Morrison v. Trivita, Inc.*, 2013
 4 WL 1148070 (S.D.Cal.2013) *3, citing *Sun Valley Gasoline, Inc. v. Ernst Enters.*,
 5 711 F.2d 138, 139 (9th Cir.1983) (quoting *Augustine v. United States*, 704 F.2d
 6 1074, 1077 (9th Cir.1983). “In such cases, ‘the jurisdictional determination should
 7 await a determination of the relevant facts on either a motion going to the merits or
 8 at trial.” *Morrison, supra* at *3, citing *Augustine, supra* at 1077.

9 To be successful in a factual attack, the defendant must demonstrate that the
 10 allegations in the complaint that give rise to standing are untrue. However, where
 11 defendant’s contentions require a plaintiff to prove the merits of the case at an
 12 early stage, the court must refuse such a request. *California Sportfishing Protect.*
 13 *Alliance v. All Star Auto Wrecking, Inc.* 860 F.Supp.2d 1144, 1152 (E.D.Cal.2012)
 14 [finding motion to dismiss claiming plaintiff required to show proof of actual
 15 environmental hard to establish standing for claims brought under the Clean Water
 16 Act was not appropriate at the pleading stage.] The Ninth Circuit reiterated this
 17 ruling again on February 24, 2014. In the case of *In re Clark*, 2014 WL 709976
 18 (9th Cir. 2014), the Ninth Circuit affirmed the lower court’s denial of a motion to
 19 dismiss for lack of standing which asked the court to make such a finding based on
 20 affirmative defenses (i.e., laches, statute of limitations). *Id.* The Ninth Circuit
 21 held that while the defendant may ultimately be right in its assertions, inquiry into
 22 the merits at the pleading stage is inappropriate. *Id.*, citing *Maya v. Centex Corp.*,
 23 658 F.3d 1060, 1068 (9th Cir.2011) (“[t]he jurisdictional question of standing
 24 precedes, and does not require, analysis of the merits.”). As shown below, that is
 25 precisely what Conair is asking the Court to do through its Motion.

26 **A. The Use of Extrinsic Evidence At The Pleading Stage Is Limited**

27 When defendant makes a factual attack at the pleading stage, the court may
 28 consider extrinsic evidence such as affidavits. *Calif. Sportfishing, supra* at 1147.

1 However, only admissible evidence may be considered. *3D Systems v. Envisiontec,*
 2 *Inc.*, 575 F.Supp.2d 799, 804 [On a motion to dismiss, only relevant, admissible
 3 evidence is considered. Hearsay evidence may not be considered.] Further, where
 4 the motion to dismiss and supporting evidence attack the sufficiency of the
 5 allegations on their face, the motion will be treated as a facial attack, which means
 6 the Court must presume the facts alleged in the complaint are true. *Id.* at 1150.³

7 As an initial matter, Plaintiff contends Defendant has failed to submit any
 8 admissible evidence for the Court to consider. Defendant submits three
 9 declarations, two of which have exhibits. Plaintiff has submitted with this
 10 Opposition legal objections to these motions which show they do not constitute or
 11 contain admissible evidence. As such, Plaintiff respectfully requests the
 12 declarations be stricken and not considered.

13 **III. PLAINTIFF HAS ESTABLISHED AN INJURY-IN-FACT**

14 Defendant argues without any supporting authority that Plaintiff Czuchaj has
 15 failed to allege an injury-in-fact because she only seeks to recover the lost cost of
 16 the Hair Dryer.⁴ This would be considered a facial attack on the allegations as
 17 Defendant does not dispute the truth of the allegations and therefore the Court must
 18 presume the truth of the facts alleged.⁵

19 An “injury-in-fact need not be monetary but it must be distinct and palpable,
 20 and of a type redressible by the Court.” *Brace v. Lifeguard, Inc.*, 1995 WL 32868
 21 (N.D.Cal.1995) *3; *see also Valley Forge Christian College v. Amer. For United*
 22 *Separation of Church and State, Inc.*, 484 U.S. 464, 486 (1982). “Economic injury
 23 is a sufficient basis for standing.” *Overton v. Bird Brain, Inc.*, 2012 WL 909295
 24 (C.D.Cal.2012) * 3. “Purchasing a product based on misrepresentations or

25 ³ Where the court clearly see the extrinsic evidence as attacking the complaint on
 26 its face, the motion to dismiss is considered a facial attack and the presumption the
 27 facts alleged are true applies. *Calif. Sportfishing, supra* at 1150-51. Here, it
 28 appears Defendant’s argument that Plaintiff Czuchaj has not pled an injury-in-fact
 and was required to submit a warranty claim would be a facial attack because there
 are no allegations in the FAC that she did submit a claim.

⁴ Defs. MTD, p.9:13-18.

⁵ *Morrison, supra* at *3; *Safe Air for Everyone, supra* at 1039.

omissions is sufficient injury to confer standing.” *Id.* See also *Keilholtz v. Lennox Hearth Prod.*, 268 F.R.D. 330, 335-36 (N.D.Cal.2010). Standing is also conferred where plaintiffs purchased an unsafe product for which they want a refund. *In re Mattel, Inc. Toy Lead Paint Prod. Liab. Litig.*, 588 F.Supp.2d 1111, 1114 (C.D.Cal.2008).

As set forth in Plaintiffs’ Opposition to Defendant’s Motion to Dismiss Pursuant to FRCP 12(b)(6) and again above, Plaintiff Czuchaj has established that she seeks on behalf of herself and Class Members monetary damages, including damage to property.⁶ In addition, Plaintiff submits with this Opposition a declaration from Plaintiff Cynthia Czuchaj stating she did in fact suffer damage to her property as a result of the defective hair dryer.⁷ As indicated in the Opposition to the Motion to Dismiss Pursuant to Rule 12(b)(6), if the Court finds these allegations insufficient, Plaintiffs can amend their complaint to include the facts providing more detail regarding the property damage suffered by Ms. Czuchaj. In addition, Plaintiff Czuchaj on behalf of herself and Class Members seek refunds, injunctive and declaratory relief. These allegations show Ms. Czuchaj has alleged an “injury-in-fact”. Therefore, Defendant’s Motion to Dismiss on these grounds should be denied.

IV. PLAINTIFF IS NOT REQUIRED TO SUBMIT A WARRANTY CLAIM IN A CASE WITHOUT AN EXPRESS WARRANTY CAUSE OF ACTION

Defendant argues that Ms. Czuchaj does not have a claim or controversy because “[A] dispute would only exist if Conair rejected a warranty claim.” Defs. MTD, p. 9:25-26, *see also* “Ripeness” argument, p. 10-11. Again, Conair does not support its contention with any legal authority which is not surprising since the legal authority supports the opposite contention.

⁶ Pltfs. Opp. To Def. MTD Pursuant to Rule 12(b)(6), pp. 17-18; *see* Sect. I.A above for specific allegations in the FAC.

⁷ Dec. of Cynthia Czuchaj (“Czuchaj Dec.”), ¶2

1 The FAC does not contain any allegations Conair breached its express warranty
 2 for the hair dryers. Plaintiffs allege a Breach of the Implied Warranty of
 3 Merchantability in the Fifth Cause of Action. FAC, pp. 27-28. Plaintiffs also
 4 allege a violation of the Magnuson-Moss Warranty Act and the Song-Beverly Act
 5 in the Sixth and Seventh Causes of Action, respectively. FAC, pp. 29-31. These
 6 claims are all premised on the fact that the hair dryers were not fit for their
 7 ordinary purpose, which is to safely dry hair. (breach of implied warranty) FAC,
 8 ¶¶104, 113, 121, and 124.

9 There is no requirement that a consumer provide a manufacturer an opportunity
 10 to repair or redress the situation before filing a claim for breach of implied
 11 warranty. *Mocek v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 405 (2003); *Keegan v.*
 12 *Amer. Honda Motor Co., Inc.*, 838 F.Supp.2d 929, 947 fn. 55. These courts have
 13 expressly and directly rejected Defendant's argument that a consumer must first
 14 make a reasonable number of attempts to cure the defect. As such, the Declaration
 15 of Ms. Fong submitted by Defendant in an attempt to show Plaintiff Czuchaj never
 16 submitted a warranty claim is irrelevant. On these grounds, Defendant's Motion
 17 should be denied.

18 **V. CONAIR HAS NOT SUBMITTED ADMISSIBLE EVIDENCE TO**
 19 **SUPPORT DISMISSAL OF PLAINTIFF CZUCHAJ'S CLAIMS**
 20 **ON REDRESSIBILITY GROUNDS**

21 Conair's final argument is that the Court cannot possibly redress Ms. Czuchaj's
 22 claims for declaratory and injunctive relief because Conair claims to have fixed the
 23 defect. Defs. MTD, pp. 11-12. Defendant does not rely on any legal authority for
 24 its argument, but instead relies solely on the Declaration of Wayne Dieterle to
 25 support its contention that Conair fixed the defect and the injury cannot be
 26 redressed by the Court. Def. MTD, p. 11:26-28.⁸ However, a review of the
 27 "evidence" submitted by Defendant reveals there is not enough admissible

28 ⁸ This argument sounds more like one that Plaintiff Czuchaj's claim is moot which is not an appropriate request through a motion to dismiss pursuant to Rule 12(b)(1).

1 evidence to make such a determination at this time and even if Conair's claims
 2 could be adequately shown, Plaintiffs have alleged any efforts by Conair to cure or
 3 offer relief to consumers is inadequate. FAC, ¶¶31, 33, 35, and 40.

4 **A. Declaration of Wayne Dieterle**

5 Defendant appears to submit this declaration in an attempt to support its
 6 contention that Conair has resolved the defect problem.⁹ If this evidence were
 7 relevant and admissible, it may be related to an affirmative defense that may be
 8 raised by Conair to the claim for injunctive and declaratory relief. However, since
 9 that defense has not yet been raised by Conair in an Answer, it is entirely irrelevant
 10 at this stage.

11 In addition, the declaration completely lacks foundation for its conclusion that
 12 the defect has been resolved. Mr. Dieterle declares that prior to the lawsuit, Conair
 13 became aware of consumer complaints, conducted a "robust investigation" and
 14 improved the product design to address the issue thereby curing the issue.¹⁰ What
 15 Mr. Dieterle does not provide is any indication of when this happened or how he
 16 knows the defect was cured. He also does not provide details on what was done to
 17 "cure" the defect. The declaration merely provides conclusory, self-serving
 18 statements without any foundation for his knowledge or conclusions. *Griffin v.*
 19 *West Bay Properties, Inc.*, 2011 WL 2437493 (C.D.Cal.2011) *2 ["Admissible
 20 declarations or affidavits must be based on personal knowledge, must set forth
 21 facts that would be admissible evidence at trial, and must show that the declarant or
 22 affiant is competent to testify as to the facts at issue." *See also* Fed.R.Civ.P. 56(e).

23 Submission of Mr. Dieterle's declaration also shows that Defendant's motion is
 24 really requesting the Court resolve the merits of Plaintiff's injunctive and
 25
 26

27
 28 ⁹ Conair merely recites the contents of the declaration in its motion, but fails to tie
 it directly to any supplemental argument. Therefore, Plaintiff is surmising this is
 the issue to which it is intended to be related.

¹⁰ Dieterle Dec., ¶¶7-9.

1 declaratory relief claims by submitting it purportedly to show no remedy can be
2 had under that claim.¹¹

3 Even if Mr. Dieterle's statements were admissible, Defendant's argument has
4 been rejected where plaintiff challenges a recall or other cure offered by the
5 manufacture was adequate, covers all class members, provides adequate
6 disclosures and provides a permanent solution. *Overton, supra* at *4 [Court denied
7 motion to dismiss as moot where defendant alleged it had recalled the defective
8 products finding there was not enough information at the pleading stage to
9 determine whether a suitable remedy had been provided]; *see also Postier v.*
10 *Louisiana-Pacific Corp.*, 2009 WL 3320470 *5 (N.D.Cal.2009). Whether or not
11 such remedies are available is an issue plaintiff must prove at trial and therefore
12 Defendant's Motion to Dismiss should be denied.¹²

13 **VI. IF ANY OF THE ALLEGATIONS ARE FOUND INSUFFICIENT,**
14 **THE COURT SHOULD GRANT PLAINTIFFS LEAVE TO**
15 **AMEND**

16 Federal Rule of Civil Procedure 15(a) provides "the court should freely give
17 leave [to amend] when justice so requires." The United States Supreme Court
18 requires lower courts to freely grant leave to amend. *Howey v. United States*, 481
19 F.2d 1187, 1190 (9th Cir.1973). The policy in favor of permitting amendment is to
20 be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc*, 317
21 F.3d 1048, 1052 (9th Cir.2003). Therefore, to the extent the Court finds any of
22 Plaintiffs' allegations insufficient, leave to amend is requested.

23 DATED: March 10, 2014

24 By: _____s/Katherine J. Odenbreit_____
25 Katherine J. Odenbreit
26 ODENBREIT LAW, APC

27 ¹¹ Defs. MTD, p. 11-12.

28 ¹² *Morrison v. Trivita, Inc.*, *supra* at *3 [finding the issue of standing was
sufficiently intertwined with the merits of the claim where defendant argued
consumer plaintiff had not purchased the product at issue. "Ultimately [plaintiff]
must prove injury as a substantive matter." *Id.*]

CERTIFICATE OF SERVICE

I am over the age of eighteen and not a party to the within action. My business address is 16835 Algonquin Street, Suite 221, Huntington Beach, CA 92649. I am a principal at that address at the firm of Odenbreit Law, APC. On the date set forth below, I caused to be served the following document(s) described as PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 12(b)(1); DECLARATION OF KATHERINE J. ODENBREIT; DECLARATION OF CYNTHIA CZUCHAJ; PLAINTIFFS' OBJECTIONS TO DEFENDANT'S EVIDENCE SUBMITTED IN SUPPORT OF MOTION on all the interested parties in this action as follows:

Ryan Saba
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[X] BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM: In accordance with the electronic filing procedures of this Court, service has been effectuated on Ryan Saba of Rosen Saba LLP, who is counsel of record for Defendant and a registered participant of the CM/ECF System.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed on this 10th day of March, 2014 at Huntington Beach, California.

_____/s/ Katherine J. Odenbreit_____
 Katherine J. Odenbreit